

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 08-00311-01-CR-W-FJG
)	
CUSTODIO GARCIA,)	
)	
Defendant.)	

ORDER

Currently pending before the Court is defendant's Motion for an Extension of Time to File a Late Notice of Appeal (Doc. # 290) and a Report and Recommendation regarding the Motion for an Extension of Time (Doc. # 324).

Custodio Garcia was charged in an indictment with one count of conspiracy to distribute more than 500 grams of methamphetamine, more than five kilograms of cocaine and more than 50 kilograms of marijuana. He was also charged with one count of being an illegal alien in possession of a firearm, one count of aiding and abetting the possession of a firearm during a drug trafficking crime and one count of illegal entry into the United States. On August 19, 2009, Custodio Garcia pled guilty to Counts 1, 3, 4 and 11 of the Indictment. Garcia was sentenced on October 28, 2010 to a total term of 180 months. The Judgment was entered by this Court on November 1, 2010. On November 17, 2010, Garcia's attorney filed a Notice of Appeal. The appeal was docketed in the Eighth Circuit Court of Appeals on November 23, 2010 and a briefing schedule was established. On February 1, 2011, Garcia's attorney filed his brief in the

Eighth Circuit. On March 10, 2011, the Government filed a Motion to Dismiss the Appeal as untimely. Garcia's attorney filed suggestions in opposition to the Motion to Dismiss and on April 6, 2011, the Eighth Circuit remanded the case to this Court for a determination of whether Garcia is entitled to an extension of time to file his notice of appeal under Fed.R.App.P. 4(b)(4). The Court directed the parties to brief the issue. After reviewing the briefs, the Court determined that an Evidentiary Hearing was necessary and referred the case to a magistrate judge on July 5, 2011. On September 30, 2011, Chief Magistrate Judge Larsen conducted a hearing and heard testimony from defendant's former attorney, Sean Pickett. On October 12, 2011, counsel for defendant filed a brief regarding the excusable neglect issue. On December 12, 2011, Magistrate Larsen filed a Report and Recommendation finding that defendant's delay in filing the Notice of Appeal was due to excusable neglect and recommending that the Court grant the Motion for an Extension of Time to File a Notice of Appeal.

The Court, after independent review of the record and applicable law, adopts and incorporates by reference herein, the Magistrate's findings and conclusions. Therefore, the Court hereby **ADOPTS** the Report and Recommendation and hereby **GRANTS** Defendant's Motion for an Extension of Time to File a Notice of Appeal (Doc. # 290).

Date: January 5, 2012
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
Chief United States District Judge